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Supreme Court of the United States

October Term 1977

No. 77-1150

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., *et al.*,
Appellants,

v.

THE PINE CREEK CONSERVANCY DISTRICT, *et al.*,
Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

BRIEF OF AMICI CURIAE IN SUPPORT OF MOTION TO AFFIRM

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TABLE OF CONTENTS

Identification and Interest of Amici Curiae 1

Counter Statement of the Case 2

A. The Conservancy Court 3

B. The Pine Creek Conservancy District 4

Argument 5

I. The Ohio Conservancy Act, in Providing for a Conservancy Court in the Formation and Administration of a Conservancy District, Does Not Offend the Due Process Clause of the Fourteenth Amendment to the United States Constitution 5

II. Section 6101.07 of the Ohio Revised Code, in Providing for a Conservancy Court Made Up of One Judge from each County Within the District, Does Not Deprive the Voter of the District Equal Protection of the Laws in Violation of the Fourteenth Amendment to the United States Constitution 17

III. The Provision of Section 6101.05, Ohio Revised Code, Permitting a Political Subdivision to Sign a Petition for Creation of a Conservancy District Does Not Disenfranchise Anyone 20

Conclusion 21

Appendix A:

Constitution of the State of Ohio, Article IV, §4 .. A1

Appendix B:

Excerpts from Ohio Revised Code Chapter 163 (the Ohio Uniform Eminent Domain Act):

§163.01 ..... A3

§163.04 ..... A3

§163.05 ---- A4
§163.06 ---- A5
§163.07 ---- A7
§163.08 ---- A7
§163.09 ---- A8
§163.10 ---- A10
§163.14 ---- A10
§163.15 ---- A11
§163.16 ---- A12
§163.19 ---- A12

Appendix C:

Ohio Revised Code, §2101.01 ---- A13

Appendix D:

Ohio Revised Code, §2723.01 ---- A14

Appendix E:

Excerpts from Ohio Revised Code Chapter 6101 (the Ohio Conservancy Act):

§6101.04 ---- A15
§6101.06 ---- A16
§6101.061 ---- A16
§6101.18 ---- A17
§6101.27 ---- A17
§6101.28 ---- A18
§6101.31 ---- A20
§6101.32 ---- A21
§6101.35 ---- A24
§6101.43 ---- A25
§6101.59 ---- A26
§6101.60 ---- A27

Appendix F:

Excerpts from the Ohio Legal Directory, 1976-1977 A30

TABLE OF AUTHORITIES

Cases

Abate v. Mundt, 403 U.S. 182 (1971) ---- 18

Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973) ---- 18

Avery v. Midland County, 390 U.S. 474 (1968) ---- 18

Bailey v. Anderson, 326 U.S. 203 (1945) ---- 14

Bauman v. Ross, 167 U.S. 548 (1897) ---- 9

Bragg v. Weaver, 251 U.S. 57 (1919) ---- 14

Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District, 429 U.S. 651 (1977) 19

Corporation Comm'n v. Lowe, 281 U.S. 431 (1930) ---- 19

Dugan v. Ohio, 277 U.S. 61 (1928) ---- 16

Embree v. Kansas City Road District, 240 U.S. 242 (1916) ---- 12, 13

Fallbrook Irrigation District v. Bradley, 164 U.S. 112 (1896) ---- 8

Gaffney v. Cummings, 412 U.S. 735 (1973) ---- 19

Gibson v. Berryhill, 411 U.S. 564 (1973) ---- 5

Hagar v. Reclamation District No. 108, 111 U.S. 701 (1884) ---- 6, 13

Hibben v. Smith, 191 U.S. 310 (1903) ---- 10

Houck v. Little River Drainage District, 239 U.S. 254 (1915) ---- 11

In re Murchison, 349 U.S. 133 (1955) ---- 5

Lindsey v. Normet, 405 U.S. 56 (1972) ---- 14

Londoner v. Denver, 210 U.S. 373 (1908) 10
North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925) 14
Reynolds v. Sims, 377 U.S. 533 (1964) 18, 19
Sailors v. Board of Education, 387 U.S. 105 (1967) 18
Salyer Land Co. v. Tulare Water District, 410 U.S. 719 (1973) 18
Spencer v. Merchant, 125 U.S. 345 (1888) 7
Tumey v. Ohio, 273 U.S. 510 (1927) 5, 15, 16, 17
United States v. Raines, 362 U.S. 17 (1960) 14
Ward v. Monroeville, 409 U.S. 57 (1972) 5, 15
Whalen v. Roe, 429 U.S. 589 (1977) 14
Whitcomb v. Chavis, 403 U.S. 124 (1971) 19

Constitutional Provisions

United States Constitution, Amendment XIV 5, 17
Constitution of the State of Ohio, Article IV, §4 15

Statutes

Ohio Revised Code:
Chapter 163, Ohio Uniform Eminent Domain Act 4, 14
§163.01 15
§163.05 15
§2101.01 15
§2701.03 15
§2723.01 13
Chapter 6101, Ohio Conservancy Act 2, 4, 5, 8, 12, 13, 14, 16, 17, 21

§6101.05 ..... 3, 20
§6101.06 16
§6101.07 ..... 3, 17
§6101.08 ..... 3, 16, 18, 20
§6101.10 ..... 3, 18
§6101.13 ..... 3, 18
§6101.27 ..... 3, 18
§6101.28 4
§6101.31 4
§6101.32 4
§6101.33 ..... 4, 18
§6101.34 4
§6101.35 ..... 4, 14
§6101.39 18
§6101.43 13
§6101.44 18
§6101.45 18
§6101.53 18
§6101.54 18
§6101.60 13
§6101.63 18
§6101.67 4

Rules

United States Supreme Court Rule 42(2) 2

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IDENTIFICATION AND INTEREST OF AMICI CURIAE

Joining in this *amici curiae* brief are essentially all of the active conservancy districts in the State of Ohio, consisting of The Hocking Conservancy District, Lake Erie Conservancy District No. 1, The Margaret Creek Conservancy District, The Maumee Watershed Conservancy District, The Miami Conservancy District, The Mill

Creek Valley Conservancy District, Muskingum Watershed Conservancy District, Rushcreek Conservancy District, and The Wabash River Conservancy District of Ohio (hereinafter collectively referred to as the "Districts"). Pursuant to Rule 42(2), this brief is filed with the written consent of counsel for the appellants and counsel for the appellees, which consents have been filed with the Clerk of the Court.

The Districts joining in this brief are conservancy districts of the State of Ohio, organized and existing pursuant to the Ohio Conservancy Act, Chapter 6101, Ohio Revised Code. The Districts encompass within their boundaries all or a portion of forty-seven of the eighty-eight Ohio counties. As of December 31, 1976, the total bonded indebtedness of the Districts was $12,794,000.

This appeal presents a constitutional challenge to the Ohio statutes pursuant to which all Ohio conservancy districts have been organized and under which all such districts are operated and managed. The Court's decision on this appeal may affect the existence of all of Ohio's conservancy districts. On the basis of their collective experience, the Districts submit that the conservancy courts as they are presently constituted and function under the Ohio Conservancy Act are essential to the continued achievement of the beneficial purposes of the Act. They therefore respectfully submit this *amici curiae* brief in the interest of preserving the statutory provisions being challenged on this appeal.

COUNTER STATEMENT OF THE CASE

The Districts accept the procedural history of the case as set forth in the appellants' Jurisdictional Statement. Some further background as to the role of the conservancy court under the Ohio Conservancy Act and the facts in

the record as to the Pine Creek Conservancy District, however, may be helpful.

A. The Conservancy Court

Ohio Revised Code §6101.07 provides for the organization of conservancy courts to perform certain functions with regard to conservancy districts under the Conservancy Act. Such courts are made up of one judge of the court of common pleas from each county lying in whole or in part within a conservancy district. Ohio Revised Code §6101.07 (Appellants' Appendix, 17). The court comes into existence after a judge of the common pleas court in which the petition for the formation of a conservancy district is filed determines that the petition satisfies the signature and other requirements set forth in Ohio Revised Code §6101.05 (Appellants' Appendix, 15).

After the conservancy court is convened, it conducts a hearing to determine whether the petition for formation of the conservancy district should be granted. Ohio Revised Code §6101.08 (Appellants' Appendix, 20). If the petition is granted, the court appoints a board of directors for the district. Ohio Revised Code §6101.10. The board then prepares a plan of improvements for which the district was created, and after notice and a hearing, the board may adopt such plan. Ohio Revised Code §6101.13 (Appellants' Appendix, 22). If the plan is adopted, the board submits the plan to the court. After notice and another hearing, the court may approve the plan. Ohio Revised Code §6101.13.

If the conservancy court finds the petition sufficient, it appoints a board of appraisers for the district. Ohio Revised Code §6101.27 (Appendix E attached hereto, A17). The board must appraise the benefits of every kind which will result from the improvements included in the plan and appraise the damages sustained and the value of land

and other property necessary to be taken for the improvements. Ohio Revised Code §6101.28 (Appendix E, A18). After the appraisals are completed, they are prepared as a report and filed with the clerk of the conservancy court. Ohio Revised Code §6101.31 (Appendix E, A20). After notice and an opportunity to be heard (Ohio Revised Code §6101.32, Appendix E, A21 and §6101.33, Appellants' Appendix, 27), the court may return the report to the board for further consideration, or order the board to alter the report in specific respects. Ohio Revised Code §6101.33. If satisfied with the report and that the estimated cost of constructing the improvements is less than the benefits appraised, the court approves the report. Ohio Revised Code §6101.34 (Appellants' Appendix, 28).

If the owner of property scheduled to be taken or damaged for the purposes of the improvement is not satisfied with the award as to compensation or damages as set forth in the report as confirmed by the court, such owner has the right to a trial *de novo* under the procedures of Ohio's Uniform Eminent Domain Act. Ohio Revised Code §6101.35 (Appendix E, A24) and Chapter 163, Ohio Revised Code (Appendix B, A3).

The conservancy court manages none of the district's facilities or services, initiates no revenue-generating measures for the district, and does not participate in deciding how the district's money is spent, excepting only that it determines the compensation of the members of the district's boards, the maximum amount of which is set by statute. Ohio Revised Code §6101.67.

B. The Pine Creek Conservancy District

The Pine Creek Conservancy District was formed in 1966 in apparent conformity with the procedures set out in the Conservancy Act. It is located in southern Ohio and has within its boundaries a portion of Scioto County and a portion of Lawrence County.

The record before this Court presents no evidence as to how many persons from Scioto County or from Lawrence County reside within the district. There is nothing in the record to show the value or the extent of the land owned by the appellants situated within the district. The record is devoid of facts to indicate that appellants, or any of them, have property which is scheduled to be taken or damaged in the prosecution of the plan for the district. The appellants have failed to develop a record which is adequate to present any constitutional issue for plenary consideration of this appeal.

ARGUMENT

I. THE OHIO CONSERVANCY ACT, IN PROVIDING FOR A CONSERVANCY COURT IN THE FORMATION AND ADMINISTRATION OF A CONSERVANCY DISTRICT, DOES NOT OFFEND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants' first challenge to the constitutionality of the Ohio Conservancy Act, Chapter 6101 of the Ohio Revised Code, seeks to invoke the principle in *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Monroeville*, 409 U.S. 57 (1972). Under scrutiny in those cases were state procedures by which the chief executive officer of a municipality in a criminal case could try, convict and fine a defendant where such chief executive officer had a substantial pecuniary interest in the conviction. Such procedures were found to be incompatible with due process.

Appellants' first constitutional challenge to the Ohio Conservancy Act *assumes* that the kind of adjudicative process involved in *Tumey*, *Ward*, *In re Murchison*, 349 U.S. 133 (1955) and *Gibson v. Berryhill*, 411 U.S. 564 (1973) is the same kind of process which the conservancy court is called upon to perform under Chapter 6101 of the Ohio Revised Code. In this assumption, appellants err.

Decisions by this Court involving drainage, irrigation and other "special benefit" districts have long recognized the special nature of the kinds of decisions initially made in the organization and operation of such districts. Specifically, this Court has repeatedly held that in the context of levying special assessments to pay for the improvements of such districts, and in awarding compensation for property taken or damaged to achieve the purpose of such districts, state legislatures consistent with due process may delegate all such decisions *in the first instance* to a single board, body or tribunal *so long as*, at some point in the proceedings before such decisions become final, an adversely affected party is provided with notice and the opportunity to be heard in a trial *de novo* in the state's regular court system.

In *Hagar v. Reclamation District No. 108*, 111 U.S. 701 (1884), a California statute established a procedure by which reclamation districts could be formed, a procedure which bears a striking resemblance to the Ohio Conservancy Act. Under the California statute, a reclamation district embracing over 74,000 acres situated in two counties was established, a reclamation works was planned and a first assessment to pay the estimated cost of the works was levied upon the lands in the district. When the monies under the first assessment proved insufficient to complete the project, an additional sum was assessed and levied. The second assessment became delinquent on the defendant's lands, and the district brought this action to sell the lands to satisfy the assessments. The trial court upheld the liens and ordered the lands sold. On appeal, the Supreme Court affirmed. In this opinion, the Court observed:

> "The system adopted in California to reclaim swamp and overflowed lands by forming districts . . . is not essentially different from that of other States, where lands of that description are found. The fact that the lands may be situated in more than one county, cannot affect the power of the State to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate." 111 U.S. at 704-705.

This Court went on to hold that if the legislature delegates to a tribunal the task of levying a tax on property according to its value, if the landowners were not given notice and an opportunity to be heard *prior* to the levy of assessment, due process is nevertheless afforded if the assessment can only be enforced through legal proceedings wherein notice and the opportunity to be heard are provided.

> "The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defence going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defence, all his grievances. If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller, in the New Orleans case, these words as used in the Constitution, can have no definite meaning." 111 U.S. at 711-712. (Citation omitted.)

As was made clear in *Spencer v. Merchant*, 125 U.S. 345 (1888), some of the decisions involved in the carrying

out of a district's purposes are not subject to judicial review at all:

> "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." 125 U.S. at 355-356. (Citations omitted.)

In *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), this Court upheld an 1887 statute for the organization and government of irrigation districts in California. Under the statute, landowners could petition the supervisors of the county in which was located the greatest portion of the lands proposed to be included in the district. The petition was to set forth the boundaries of the district and ask that the district be established. The statute provided for published notice in each county in which any portion of the proposed district would lie, stating the time of the meeting at which the petition would be presented to the supervisors. The statute further stated that when the petition was presented the board "shall hear the same . . . ." This procedure is fundamentally identical to the organizational steps provided for in the Ohio Conservancy Act. This procedure was followed in *Fallbrook*, and the organizational expense of the district was assessed on lands within the district. Plaintiffs brought this action to set aside the assessment, alleging that plaintiffs' lands did not need water and that the plaintiffs had not been given a hearing

as to the benefits assessed. The Circuit Court for the Southern District of California held the assessment unconstitutional. The Supreme Court reversed. In the opinion, the Court made clear that where the legislative scheme provided for a hearing *at some time* to those interested in the question whether lands included in the district would be benefited by the proposed project, such procedure satisfied the requirements of the due process clause.

> "It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, *which is open to the discretion of the state legislature, and with which this court ought to have nothing to do.* The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law." 164 U.S. at 176-177. (Emphasis supplied.)

In *Bauman v. Ross*, 167 U.S. 548 (1897), the constitutionality of an Act of Congress providing for road improvements in the District of Columbia was upheld. There, the same "tribunal" or "commission" appointed by a court (and referred to as "a jury" in the statute) participated in the exercise of both the taxing power and the power of eminent domain in that the same tribunal awarded compensation for the taking of property for the street improvements and assessed "benefits" on other property (by which revenue is obtained) in order to pay for such taking. Mr. Justice Gray expressed the unanimous opinion of the Court, as follows:

> "Likewise, in the matter of assessing benefits, under the right of taxation, *it is within the discretion of the legislature*, as shown by the authorities already referred to upon this subject, *to commit the ascertainment of the lands to be assessed, as well as the appor-*

tionment of the assessment among the different parcels, to the determination of commissioners appointed as the legislature may prescribe.

"Whether the estimate of damages and the assessment of benefits shall be entrusted to the same or to different commissioners, is a matter wholly within the decision of the legislature, as justice and convenience may appear to it to require. *And there are many precedents for entrusting the performance of both duties to the same persons.*" 167 U.S. 593. (Citations omitted; emphasis supplied.)

Hibben v. Smith, 191 U.S. 310 (1903) was an action to foreclose a lien of assessment on defendant's property levied to help pay for a street improvement. The defendant resisted on the ground, among others, that all members of the board of the town which confirmed the assessments were residents and taxpayers of the town, and therefore "judges in their own case." The courts below upheld the validity of the assessment. In rejecting the defendant's constitutional challenges and affirming the judgment below, the Court said:

"We think the first objection, that all of the members of the board of trustees were residents of and taxpayers in the town, is wholly unimportant. * * * It is a matter of legislative discretion as to how such a board shall be constituted, and we hazard nothing in saying that it is quite common throughout the country for the legislatures of the States to create a tribunal for levying assessments for local improvements in a manner precisely like the case in question. *It is not at all analogous, even in principle, to a judge of a court acting in a case in which he is personally interested.*" 191 U.S. at 323. (Emphasis supplied.)

In *Londoner v. Denver*, 210 U.S. 373 (1908), an assessment for a local improvement was invalidated after it was proven, on the facts in the record, that the plaintiff

landowners had been given no opportunity for a hearing on the question of benefits prior to the assessment becoming irrevocably fixed. 210 U.S. at 386. Under Colorado law, no right was afforded for any judicial review (by appeal or by independent suit) of the validity of the special assessment. 210 U.S. at 380-386. In the course of the opinion, however, the Court rejected the constitutional assault on the Colorado statute establishing the framework for such improvements and assessments. After noting that the statute provided for a hearing before a board of equalization on landowners' objections to the validity and amount of the assessment prior to the levy of such assessment, the Court declared that the statute itself was "clear of all constitutional faults." 210 U.S. at 380.

The Drainage District Act of Missouri was under review in *Houck v. Little River Drainage District*, 239 U.S. 254 (1915). As provided in the Act, the defendant district had been established pursuant to the judgment of the Missouri circuit court. This suit was brought by owners of land within the boundaries of the district to restrain collection of an assessment to pay for the preliminary expense of organizing the district. The plaintiffs claimed that the statute, and the tax levied pursuant to the statute, worked to deprive them of their property without due process of law. This Court rejected that contention:

"The legislature, unless restricted by the state constitution, can create (improvement and assessment) districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. *The propriety of a delegation of this sort was a question for the State alone.* And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment, that is, it may define

the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. 239 U.S. at 262. (Citation omitted; emphasis supplied.)

In *Embree v. Kansas City Road District*, 240 U.S. 242 (1916), the Missouri statutes provided for the establishment of a road district by order of a county court. Consistent with the procedures found in the Ohio Conservancy Act, under the Missouri statutes the need for the district and its territory and boundaries were questions committed to the judgment of the county court subject to certain statutory requirements, including the requirement of public notice of the date the landowners' petition would be "considered" by the court, at which time any interested landowner would be afforded an opportunity to be heard. This action was brought by owners of land in the district to restrain the sale of bonds and the levy of special taxes to pay them. The Missouri courts rejected the plaintiffs' attack on the constitutionality of the Missouri Road District Act. This Court affirmed.

The statute itself passed constitutional muster in providing for notice to the public of the filing of the petition and that it would be considered by the county court at a given date. 240 U.S. at 248-249. Responding to the appellants' charge that an adequate hearing could not be provided because the road to be improved had not yet been selected, the Court stated that it was "not impressed with this contention." 240 U.S. at 249.

> "At best the question is one of opinion and degree, even where the improvement to be made has been definitely determined. The boundaries of drainage, irrigation and other benefit districts are often defined in this way. Indeed, it is conceded that had the legislature created this particular district the present objection would be untenable. If such a body can obtain the requisite information and exercise the requisite judgment, it is

> not easy to believe that the task would be more difficult for a county court sitting in the vicinity." 240 U.S. at 250.

In asserting that under Chapter 6101 of the Ohio Revised Code, the conservancy court is called upon to "determine judicial disputes," the appellants fail to point out how such determinations could in theory, or in fact, adversely affect them. Nor could they. For under Chapter 6101, there is no determination (of the kind which is subject to judicial review) which becomes irrevocable and uncontestable as to directly affected landowners at any stage in the conservancy court proceedings.

As to the amount and validity of the assessment, under Ohio's statutes, landowners have the right to file an independent suit to enjoin the illegal levy or collection of taxes and assessments. See §2723.01, Ohio Revised Code Appendix D, A14). Moreover, as was the case in *Hagar, supra,* and *Embree, supra,* in order to enforce a lien of assessment approved by the conservancy court, an individual suit must be filed by the district, in which the landowner may raise all such questions. See §6101.60, Ohio Revised Code (Appendix E, A29). Furthermore, §6101.43, Ohio Revised Code Appendix E, A25) establishes procedures to be followed in the event that the appraisal of benefits

> ". . . is declared by any court of competent jurisdiction to be invalid . . . ."

The General Assembly of Ohio would not have created such procedures if it intended that conservancy court confirmation of the appraisal report placed the appraisal of benefits beyond the reach of further judicial review.

With respect to the exercise of the power of eminent domain, again the procedures of Chapter 6101 provide abundant protection to all whose land may be damaged

or taken for the project. Under the Conservancy Act, any person not pleased with the amount of the conservancy court award as to compensation or damages may require the district to commence an independent action pursuant to the procedures of the Ohio Uniform Eminent Domain Act (Appendix B, A3). This is done simply by filing "a written notice" and a nominal bond with the clerk of the conservancy court. Ohio Revised Code §6101.35 (Appendix E, A24). Once the notice is filed, the conservancy district must resort to the procedures of the Eminent Domain Act, wherein the question of the amount to be awarded to the defendant property owner must be determined by a jury (and not the court). The requirements of due process are fully satisfied if, regardless of a possible preliminary defect in a condemnation procedure, the property owner, prior to the taking of his property, is afforded a trial *de novo* in which due process requirements are met. *Bailey v. Anderson*, 326 U.S. 203 (1945); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925); *Bragg v. Weaver*, 251 U.S. 57 (1919).

Without having established, on this record, that any appellant is threatened with the taking or damaging of property by reason of the improvements planned for the Pine Creek Conservancy District, appellants nevertheless suggest a theoretical possibility that a judge of the conservancy court may be the same judge before whom the appropriation action may be filed under the Ohio Eminent Domain Act.[1]

But even this possibility is remote. Under Chapter 163 of the Ohio Revised Code, the independent appropriation action may be filed either in the Court of Common

[1] This Court has repeatedly refused to declare a statute unconstitutional on its face based on a hypothetical case. *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Lindsey v. Normet*, 405 U.S. 56, 65 (1972); and *Whalen v. Roe*, 429 U.S. 589, 600, 605-606 (1977).

Pleas or in the Probate Division. §163.01(B), §163.05, Ohio Revised Code (Appendix B, A3, A4). If the proceeding is commenced in the Probate Division, it cannot be before any judge who might serve on the conservancy court since the judge of the Probate Division is specifically elected thereto. Ohio Constitution, Art. IV, §4(C) (Appendix A, A2). Also see Ohio Revised Code §2101.01 (Appendix C, A13). If the proceeding were filed in the Court of Common Pleas, there is no assurance that the judge who was appointed to the conservancy court would be the judge presiding over the eminent domain action. The Pine Creek Conservancy District is located in parts of Lawrence and Scioto Counties. In both such counties there are two Common Pleas judges (Appendix F, A30, A31). Even if the case were initially filed in the Court of Common Pleas and assigned to a judge who also serves on the conservancy court, there should be no presumption that upon objection duly raised, such judge would fail to disqualify himself or to be disqualified pursuant to the procedures of §2701.03 of the Ohio Revised Code.

In summary, then, the above discussion has endeavored to show that the kinds of tasks delegated by the Ohio Legislature to the conservancy court are fundamentally different from the adjudicative process implicated in *Tumey, supra*, and *Ward, supra*, and that therefore the *Tumey* principle is inapposite here. Moreover, as pointed out above, there is no determination made by the conservancy court which impinges upon any of appellants' rights sufficiently to raise a due process issue because both on questions of assessment (the validity and the amount) and taking, there is full opportunity to have all appropriate issues determined *de novo* in the Ohio courts.

But even if the processes involved in the operation of the conservancy court were construed to be final and strictly judicial in nature, *Tumey, supra*, and its progeny would have no application here.

The appellants argue that the judges of the conservancy court are paid a statutory per diem for their services out of the funds of the district. Ohio Revised Code §6101.08. Accordingly, appellants say that the judges have a pecuniary interest in ruling favorably on the petition so that a district may be created to compensate them for their services in reviewing the petition, and, once the district is established, they have an interest in denying exceptions to the appraisers' reports to insure that the district will have funds to pay their per diems. This argument, however, is refuted by the terms of the Conservancy Act.

With regard to proceedings on the petition, the judges are paid whether or not a district is established. The Act requires those filing a petition for a district to file a bond to secure the costs of the proceedings on the petition (Ohio Revised Code §6101.06, Appendix E, A16), and authorizes the costs of such proceedings to be paid out of that bond if the petition is denied (Ohio Revised Code §6101.08, Appellants' Appendix, 20). The conservancy court, therefore, has no *Tumey* interest in the outcome of the proceedings on the petition.

Nor is there any pecuniary incentive to rule one way or the other on exceptions to the appraisers' reports after the district is formed. The per diems are paid out of the funds of the district regardless of whether the exceptions are granted or denied. See *Dugan v. Ohio*, 277 U.S. 61, 65 (1928).

Moreover, another fundamental distinction exists between the *Tumey* situation and the proceedings of a conservancy court. In the latter situation, the special benefits found form the basis for special assessments levied to pay all or part of the cost of the public improvement. Such amount is finite in its total. If the benefits assessed to one landowner are changed (lowered or raised) as a result of the board conservancy court proceedings, the total of the

assessments required to meet the cost of the improvement would nevertheless remain the same. Only the apportionment between the property owners would vary. Therefore, there is no proscribed *Tumey* incentive built into the conservancy court proceedings which might tend to cause the court to wish to reject a particular landowner's exceptions.

Finally, an examination of the functions of the conservancy court demonstrates that the court has no responsibility for initiating revenue-generating measures and has only an insubstantial role in determining how the funds of the district are spent. Its function with regard to the finances of the district is primarily to review what the board of directors has done or proposes to do in certain specifically enumerated areas, thereby providing a check upon the exercise of the board's discretion.

For all of the above reasons, appellants' first constitutional challenge to the Ohio Conservancy Act is wholly insubstantial.

II. SECTION 6101.07 OF THE OHIO REVISED CODE, IN PROVIDING FOR A CONSERVANCY COURT MADE UP OF ONE JUDGE FROM EACH COUNTY WITHIN THE DISTRICT, DOES NOT DEPRIVE THE VOTER OF THE DISTRICT EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants assert that Ohio Revised Code §6101.07 is unconstitutional because the voters of the counties within the conservancy district are disproportionately represented on the conservancy court. This claim was properly denied by the court below because the "one-man, one-vote" principle clearly does not apply to bodies such as the conservancy court.

As the discussion in Part I above has attempted to show, the conservancy court is a tribunal selected by the

state legislature to carry out conservancy projects serving the public interest. Such tribunal is provided guidelines by the state legislature, and administers the policies established in the Act. It is not a body concerning which the vote of the people is required. *Sailors v. Board of Education*, 387 U.S. 105 (1967). There is, therefore, no occasion for application of the rule of *Reynolds v. Sims*, 377 U.S. 533 (1964), *Avery v. Midland County*, 390 U.S. 474 (1968) and *Abate v. Mundt*, 403 U.S. 182 (1971).

Moreover, in *Avery v. Midland, supra*, this Court held that "one-man, one-vote" applies to governmental bodies below the state level only if such bodies exercise ". . . general governmental powers . . . ." *Id.* at 485. Inspection of the various provisions of the Conservancy Act demonstrates that the conservancy court does not exercise general governmental powers. In such a case, this Court has held the "one-man, one-vote" principle inappropriate. *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 729-731 (1973); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973).

The powers exercised by the conservancy court are much less sweeping than those exercised by the bodies in *Salyer Land Co.* and *Associated Enterprises, Inc., supra.* After the conservancy court rules on the petition for creation of the district (Ohio Revised Code §6101.08) and the district's official plan (Ohio Revised Code §6101.13), and appoints the boards of directors and appraisers (Ohio Revised Code §§6101.10, 6101.27), its functions are limited to reviewing and approving or disapproving certain specifically designated activities that the district's boards have undertaken or propose to undertake (Ohio Revised Code §§6101.33, 6101.39, 6101.44, 6101.45, 6101.53, 6101.54, 6101.63).

Finally, the appellants have failed to prove that their equal protection claim has any factual basis. The

Pine Creek Conservancy District is made up of a portion, but not all, of Scioto County and a portion, but not all, of Lawrence County. In 1970 Scioto County had approximately 20,000 more residents than Lawrence County. Yet appellants placed no evidence in the record showing how many residents of each of the respective counties resided within the district, *despite* the admonishment in the dissenting opinion in the first appeal in this case that the record was defective in this regard. *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District*, 429 U.S. 651, 659 n. 6 (1977) (Rehnquist, J. dissenting). Therefore, assuming *arguendo* that the number and residency of electors were relevant in the context of a special purpose district established by the legislature to construct improvements to be paid for by special assessments levied on real property to the extent of the special benefits conferred on such property, in this case there has been no showing that the weight of the votes of those citizens of Scioto County residing within the district is in a substantial way diluted when compared with the votes of those citizens of Lawrence County who live within the district. *Reynolds v. Sims*, 377 U.S. at 568. Where, as here, a state statute is being challenged on the ground of equal protection, the party bringing the challenge has the burden of proving the alleged discrimination. *Corporation Comm'n v. Lowe*, 281 U.S. 431, 438 (1930). This is true in the "one-man, one-vote" context. *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971). By failing to prove any disparity in the population of those portions of the two counties within the district, appellants have failed to meet that burden.[2]

[2] This failure of proof is especially critical in light of this Court's pronouncement that, except in the case of Congressional districts, minor population deviations among districts that elect members of a governmental body do not create an equal protection problem. *Gaffney v. Cummings*, 412 U.S. 735, 741-745 (1973).

III. THE PROVISION OF SECTION 6101.05, OHIO REVISED CODE, PERMITTING A POLITICAL SUBDIVISION TO SIGN A PETITION FOR CREATION OF A CONSERVANCY DISTRICT DOES NOT DISENFRANCHISE ANYONE.

Appellants argue that the challenged provisions of Ohio Revised Code §6101.05 unconstitutionally disenfranchise certain freeholders from the process by which it is decided whether or not a conservancy district is to be created. This disenfranchisement occurs, the appellants contend, because the statute permits the governing body of a public corporation or watershed district lying wholly or partly within the proposed district to sign the organization petition, and such a signature has the same effect as if every freeholder within the corporation or district had signed it. In so arguing, however, the appellants misconstrue the effect of the petition. The petition does not create the district; it merely secures consideration on the question of formation. In the process by which the decision whether to create the district is actually made, the hearing on the petition held by the conservancy court, all persons may raise their objections to the district's formation, regardless of whether the public corporation or water district in which they own property signed the petition. This is specifically guaranteed by statute.

> "Any owner of real property in a proposed district who individually has not signed such a petition and who wishes to object to the organization and incorporation of said district shall, on or before the date set for the cause to be heard, file his objections to the organization and incorporation of such district." Ohio Revised Code §6101.08 (Appellants' Appendix, 20).

In view of this patently clear provision in §6101.08 of the Revised Code of Ohio, it is obvious that Ohio Revised Code §6101.05 does not operate to deprive any freeholders

in the proposed district from fully participating in the hearing at which the conservancy court determines whether or not the district shall be organized.

CONCLUSION

Appellants' challenges to the constitutionality of the Ohio Conservancy Act are wholly insubstantial. Plenary consideration to this appeal is not warranted. The motion to affirm should be granted.

Respectfully submitted,

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APPENDIX A

Excerpt from Constitution of the State of Ohio Page's Ohio Revised Code Annotated (Appendix, 1976 Supplement)

Article IV § 4 Common Pleas court.

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justicable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts. (Amended, effective Nov. 6, 1973; SJR No. 30. Adopted May 7, 1968. Former § 4 repealed.)

APPENDIX B

Excerpts from Chapter 163 Page's Ohio Revised Code Annotated (1978 Replacement Volume)

§ 163.01 Definitions.

As used in sections 163.01 to 163.22, inclusive, of the Revised Code:

(A) "Public agency" means any governmental corporation, unit, organization, or officer authorized by law to appropriate property in the courts of this state. "Private agency" means any other corporation authorized by law to appropriate property in the courts of this state. "Agency" includes any public agency or private agency.

(B) "Court" includes the court of common pleas and the probate court of any county in which the property sought to be appropriated is located in whole or in part.

(C) "Owner" includes any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated.

(D) "Real property," "land," or "property" includes any estate, title, or interest in any real property which is authorized to be appropriated by the agency in question, unless the context otherwise requires.

§ 163.04 Appropriation.

Appropriations shall be made only after the agency is unable to agree, for any reason, with the owner, or if more than one, any owner, or his guardian or trustee, or when any owner is incapable of contracting in person or by agent and has no guardian or trustee, or is unknown, or is not a resident of this state, or his residence is un-

known to the agency and cannot with reasonable diligence be ascertained.

§ 163.05 Petition for appropriation.

An agency which has met the requirements of section 163.04 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action and all petitions shall contain:

(A) A description of each parcel of land or interest or right therein sought to be appropriated, such as will permit ready identification of the land involved;

(B) In the case of a private agency, a statement that such appropriation is necessary, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;

(C) A statement of the purpose of the appropriation;

(D) A statement of the estate or interest sought to be appropriated;

(E) The names and addresses of the owners, so far as they can be ascertained;

(F) A statement showing requirements of section 163.04 of the Revised Code have been met;

(G) A prayer for the appropriation.

In the event of the appropriation of less than the fee of any parcel or of a fee in less than the whole of any parcel of property, the agency shall either make available to the owner or shall file in the office of the county engineer, a description of the nature of the improvement or

use which requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement. A set of highway construction plans shall be acceptable in providing such description for the purposes of the preceding sentence in the appropriation of land for highway purposes.

§ 163.06 Deposit with court; appraisal of structures.

(A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, which qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. The right of possession upon deposit as provided in this division shall not extend to structures.

(B) A public agency appropriating property for the purpose of making or repairing roads which shall be open to the public, without charge, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and stated in an attached declaration of intention to obtain possession and thereupon take possession of and enter upon the property appropriated, including structures situated upon the land appropriated for such purpose or situated partly upon the land appropriated therefor and partly upon adjoining land, so that such structures cannot be divided upon the line between such lands without manifest injury thereto. The jury, in assessing compensation to any owner of land

appropriated under this division shall assess the value thereof in accordance with section 163.14 of the Revised Code. The owner or occupant of such structures shall vacate the same within sixty days after service of summons as required under section 163.07 of the Revised Code, at no cost to the appropriating agency, after which time the agency may remove said structures. In the event such structures are to be removed before the jury has fixed the value of the same, the court, upon motion of the agency, shall:

(1) Order appraisals to be made by three persons, one to be named by the owner, one by the county auditor, and one by the agency. Such appraisals may be used as evidence by the owner or the agency in the trial of said case but shall not be binding on said owner, agency, or the jury, and the expense of said appraisals shall be approved by the court and charged as costs in said case.

(2) Cause pictures to be taken of all sides of said structures;

(3) Compile a complete description of said structures, which shall be preserved as evidence in said case to which the owner or occupants shall have access.

(C) Any time after the deposit is made by the public agency under division (A) or (B) of this section, the owner may apply to the court to withdraw the deposit, and such withdrawal shall in no way interfere with the action except that the sum so withdrawn shall be deducted from the sum of the final verdict or award. Upon such application being made the court shall direct that the sum be paid to such owner subject to the rights of other parties in interest provided such parties make timely application as provided in section 163.18 of the Revised Code. Interest shall not accrue on any sums withdrawable as provided in this division.

§.163.07 Notice to owners of property.

When the residence of the owners is known and is within this state, notice of the filing of a petition as provided in section 163.05 of the Revised Code shall be given to all such owners by serving a summons and a copy of such petition in the manner of service of summons in civil actions. When the residence of the owners is unknown, and as to all who cannot be served within the state, notice shall be given by publishing the substance of the petition, and a statement of the date of the filing thereof and of the date on and after which the matter may be heard, once a week for two consecutive weeks, in a newspaper of general circulation in the county, or shall be given by registered mail. When service is made by publication, section 2703.16 of the Revised Code shall be complied with.

Unless a person acquiring any interest in any property described in an appropriation petition after the filing thereof moves to be made an additional party defendant prior to the date that the case is set for the jury trial on compensation or to any journalization of a settlement entry, he shall be bound by the final judgment, without right of appeal except as to distribution, and shall receive such compensation as was awarded to his predecessor in interest to the extent that he has succeeded thereto.

§ 163.08 Answer by property owner to petition.

Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon

in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. Any answer shall be filed on or before the third Saturday after the return day of the summons or service by publication as set forth in section 163.07 of the Revised Code. No extension of time for filing of an answer shall be granted.

§ 163.09 Valuation of property taken; how determined.

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, nor approval ordered by the court to a settlement of the rights of all necessary parties, the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts by the public agency. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of

the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal. An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty

days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court may, with the consent of the parties, order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

§ 163.10 Jury selection; qualifications.

The assessment of compensation may be made at a regular or special term of court. The jury shall be selected from the jurors drawn as prescribed in sections 2313.19 to 2313.26 of the Revised Code, and qualified as in civil actions. However, it shall be grounds for challenge for cause if a juror has served in two appropriation trials in the current term of court. Depositions may be taken as in other civil cases, subject to the requirements of section 5501.21 of the Revised Code. Depositions of the officers, agents, or employees of the agency or owner shall be taken as on cross-examination. No evidence may be adduced or elicited in depositions as to value or appraisals on cross-examination, unless raised by direct examination.

§ 163.14 Jury verdict; how determined.

In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. When a building or other structure is on the property appropriated or when a building or other structure is situated partly upon the land appropriated and partly upon adjoining land so that

the structure cannot be divided upon the line between such lands without manifest injury thereto, the jury, in assessing compensation to any owner of the land, shall assess the value thereof, as part of the compensation. The title to said structure shall vest in the agency which shall have the right to enter upon the adjoining land upon which any part of the structure is located for the purpose of removing said structure therefrom, after deposit in accordance with the verdict. Such removal shall be made within ninety days after taking title to the property appropriated; provided, that the court may extend removal time upon such conditions as the court requires.

The verdict shall be signed by at least three-fourths of the members of the jury.

If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment.

§ 163.15 When agency entitled to possession; transmission of final journal entry.

As soon as the agency pays to the party entitled thereto or deposits with the court the amount of the award and the costs assessed against the agency, it may take possession; provided, that this shall not be construed to limit the right of a public agency to enter and take possession, as provided in section 163.06 of the Revised Code. When the agency is entitled to possession the court shall enter an order to such effect upon the record and, if necessary, process shall be issued to place the agency in possession. Whenever a final journal entry in an appropriation proceeding, granting to this state a fee title or any lesser estate or interest in real property is filed and journalized by the clerk of courts, the clerk of courts shall forthwith transmit to the county auditor a certified copy of said final

journal entry who shall transfer the property on his books and transmit said entry with proper endorsement to the county recorder for recording. The costs of filing such final journal entry with the county auditor and the county recorder shall be taxed as costs in the appropriation proceedings the same as other costs are taxed under section 163.16 of the Revised Code.

§ 163.16 Payment of costs.

The court costs, including jury fees, of any proceeding shall be paid as the court directs, except as may be provided for in cases of abandonment pursuant to section 163.21 of the Revised Code. The agency may offer to confess judgment in accordance with sections 2311.14 to 2311.20, inclusive, of the Revised Code, for the amount to be stated and the court costs then made in favor of any owner who in any manner enters an appearance or upon whom service has been made. If such owner refuses to accept such offer and as a result of the trial does not receive more, he shall pay all court costs accruing after the offer.

§ 163.19 Appeal; right to use property not affected.

Subject to sections 163.07 and 163.09 of the Revised Code, any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the right to take and use the property appropriated shall not be affected by such review by the appellate courts.

APPENDIX C

Excerpt from Chapter 2101 Page's Ohio Revised Code Annotated (1976 Replacement Volume)

§ 2101.01 Probate division; location; equipment; employees.

A probate division of the court of common pleas shall be held at the county seat in each county in an office furnished by the board of county commissioners, in which the books, records, and papers pertaining to the probate division shall be deposited and safely kept by the probate judge. The board shall provide suitable cases for the safekeeping and preservation of the books and papers of the court and furnish such blankbooks, blanks, and stationery as the probate judge requires in the discharge of official duties. The board shall also authorize expenditures for accountants, financial consultants, and other agents required for auditing or financial consulting by the probate division whenever the probate judge considers these services and expenditures necessary for the efficient performance of the division's duties. The probate judge shall employ and supervise all clerks, deputies, referees, and employees of the probate division.

As used in the Revised Code, "probate court" means the probate division of the court of common pleas, and "probate judge" means the judge of the court of common pleas who is judge of the probate division. All pleadings, forms, journals, and other records filed or used in the probate division shall be entitled "In the Court of Common Pleas, Probate Division," but are not defective if entitled "In the Probate Court."

APPENDIX D

Excerpt from Chapter 2723
Page's Ohio Revised Code Annotated
(1954)

§ 2723.01 Jurisdiction of courts of common pleas. (GC § 12075)

Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.

APPENDIX E

Excerpts from Chapter 6101
Page's Ohio Revised Code Annotated
(1977 Replacement Volume)

§ 6101.04 Organization and purposes of conservancy districts. (GC § 6828-2)

Any area or areas situated in one or more counties may be organized as a conservancy district, in the manner and subject to the conditions provided by sections 6101.01 to 6101.84, inclusive, of the Revised Code, for any of the following purposes:

(A) Preventing floods;

(B) Regulating stream channels by changing, widening, and deepening the same;

(C) Reclaiming or filling wet and overflowed lands;

(D) Providing for irrigation where it may be needed;

(E) Regulating the flow of streams and conserving the waters thereof;

(F) Diverting or in whole or in part eliminating water-courses;

(G) Providing a water supply for domestic, industrial, and public use;

(H) Providing for the collection and disposal of sewage and other liquid wastes produced within the district;

(I) Arresting erosion along the Ohio shore line of Lake Erie.

This section does not terminate the existence of any district organized prior to July 19, 1937, entirely within a single county.

The purposes of a district may be altered by the same procedure as provided for the establishment of such a district.

§ 6101.06 Bond of petitioners. (GC § 6828-4)

At the time of filing the petition provided for in section 6101.05 of the Revised Code, or at any time subsequent thereto and prior to the time of the hearing on said petition, a bond shall be filed, with security approved by the judge of the court of common pleas determining the sufficiency of the petition, sufficient to pay all the expenses connected with the proceeding in case the court refuses to organize the conservancy district. If at any time during the proceeding the court is satisfied that the bond first executed is insufficient in amount, it may require the execution of an additional bond within a time to be fixed, which shall be not less than ten days distant, and upon failure of the petitioners to execute such additional bond the petition shall be dismissed.

§ 6101.061 Notice to board, director of natural resources, and director of environmental protection; hearings.

Upon determining that a sufficient petition has been filed, the judge making such determination shall cause written notice thereof to be given to the director of the department of natural resources, the director of environmental protection, and to the board of directors of any conservancy district having jurisdiction over all or part of the territory affected by the proceeding or within the same major watershed area as defined by the department of natural resources and the director of environmental protection. The director of natural resources, the director of environmental protection, and the directors of such

conservancy districts may appear at any hearing considering the establishment, dissolution or merger of any conservancy district or subdistrict thereof, and be heard concerning the need for a conservancy district, the area that should be included, desirable improvements, and any other matters which in their opinion should be brought to the attention of the court.

§ 6101.18 Board may condemn property.

The board of directors of a conservancy district may condemn for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the board of appraisers of the conservancy district, in the manner provided for in sections 163.01 to 163.22, inclusive, of the Revised Code, instead of having appraisals and assessments made by the board of appraisers.

§ 6101.27 Appointment of board of appraisers. (GC § 6828-26)

At the time of making its order organizing a conservancy district or at any suitable time thereafter, the court shall appoint three appraisers to constitute the board of appraisers of the conservancy district, who shall in every case where appraisers are appointed under sections 6101.01 to 6101.84, inclusive, of the Revised Code, be recommended by the board of directors of the conservancy district. Such board shall appraise the lands or other property within and without the district to be acquired for rights of way, reservoirs, and other works of the district, and shall appraise all benefits and damages accruing to all lands within or without the district and all benefits accruing to public corporations as entities by reason of the execution of the official plan. Said appraisers shall

be freeholders residing within the state, who may or may not own lands within said district. Each of the appraisers shall, before taking up his duties, take and subscribe to an oath that he will faithfully and impartially discharge his duties as an appraiser, and that he will make a true report of the work done by him. Such appraisers shall at their first meeting elect one of their own number chairman, and the secretary of the board of directors or his deputy shall be ex officio secretary of the board of appraisers during its continuance in office. A majority of the board of appraisers constitutes a quorum, and a concurrence of the majority in any matter within the board's duties shall be sufficient for its determination. Said appraisers shall continue to hold their offices until excused by the court, and the court shall fill all vacancies in the board of appraisers, or may appoint a new board of appraisers for subsequent appraisals, as occasion requires. A new board of appraisers, if appointed, shall fill all the requirements of the board of appraisers and perform its duties.

§ 6101.28 Appraisal of benefits and damages.

During the preparation of the official plan, the board of appraisers of a conservancy district shall examine and become acquainted with the nature of plans for the improvement and of the lands and other property affected thereby, in order that it may be better prepared to make appraisals.

When the certified copy of the entry of the court approving the official plan is filed with the secretary of the conservancy district, he shall at once notify the board of appraisers, and it shall thereupon appraise the benefits of every kind to all real property within or without the district, which will result from the organization of said district and the execution of the official plan. The board of appraisers shall appraise the damages sustained and the value of the land and other property necessary to be taken by the district for which settlement has not been made by the board of directors of the conservancy district. In the progress of its work, the board of appraisers shall have the assistance of the attorney, engineers, secretary, and other agents and employees of the board of directors.

The board of appraisers shall also appraise the benefits and damages accruing to municipal corporations, counties, townships, and other public corporations, as political entities, and to this state.

Before appraisals of compensation and damages are made, the board of directors may report to the board of appraisers the parcels of land or other property it wishes to purchase, and for which it wishes appraisals to be made, both for easement and for purchase in fee simple. The board of directors may, if it deems best, specify in case of any property the particular purpose for which and the extent to which an easement in the same is desired, describing definitely such purpose and extent. The board of appraisers shall appraise all damages which may, because of the execution of the official plan, accrue to real or other property either within or without the district, which damages shall also represent easements acquired by the district for all of the purposes of the district, unless otherwise specifically stated. Wherever instructed to do so by the board of directors, the board of appraisers shall appraise lands or other property which it is necessary or desirable for the district to own, and when instructed by the board of directors to do so, the board of appraisers shall appraise both the total value of the land, and also the damages due to an easement for the purposes of the district. When such appraisals are confirmed by the court,

the board of directors has the option of paying the entire appraised value of the property and acquiring full title to it in fee simple, or of paying only the cost of such easement for the purposes of the district. The board of appraisers in appraising benefits and damages shall consider only the effect of the execution of the official plan. In making appraisals, the board of appraisers shall give due consideration and credit to any other works or improvements already constructed, or under construction, which form a useful part of the work of the district according to the official plan. Where the board of appraisers returns no appraisal of damages to any property, it shall be deemed a finding by such board of appraisers that no damages will be sustained.

§ 6101.31 Board of appraisers shall make report of findings.

The board of appraisers of a conservancy district shall prepare a report of its findings which shall be arranged in tabular form and bound in loose-leaf book form, and which shall be known as the "conservancy appraisal record." Such record shall contain the name of the owner of property appraised as it appears on the tax duplicate or the deed records if ascertainable therefrom, the tax mailing address or other known address of such owner if ascertainable, a description of the property appraised, the amount of benefits appraised, the amount of damages appraised, and the appraised value of land or other property which may be taken for the purposes of the district. In case benefits are appraised accruing to a public corporation as an entity, the name and, if ascertainable, address of such public corporation and the amount of the benefit appraised shall be entered in such record. The board shall also report any other benefits or damages or any other

matter which in its opinion should be brought to the attention of the court. No error in the names or addresses of the owners of real property or in the descriptions thereof shall invalidate said appraisal or the levy of assessments or taxes based thereon, if sufficient description is given to identify such real property.

When such report is completed, it shall be signed by at least a majority of the board and deposited with the clerk of the court who shall file it in the original case. At the same time copies of that part of the report giving the appraisal of benefits and appraisals of land to be taken and of damages in any county shall be made, certified to, and filed with the clerk of the court of common pleas of such county.

§ 6101.32. Notice of hearing on appraisals.

Upon the filing of the report of the board of appraisers of a conservancy district under section 6101.31 of the Revised Code, the clerk of the court shall give notice thereof by publication, as provided in sections 6101.01 to 6101.84, inclusive, of the Revised Code, in each county in the district in which property included in the appraisal record is located. Said notice shall be substantially as set forth in division (F) of section 6101.84 of the Revised Code. It is not necessary for said clerk to name the parties interested, except that such notice shall be addressed "To All Known and Unknown Persons or Public Corporations Interested" and in addition shall specifically designate the name of each known party whose tax mailing or other address cannot be ascertained as disclosed by the affidavit referred to in this section, but the name of any such party need be designated only in the publication made in the county or counties wherein lands, or interests in lands, owned by the party and affected by the report are located.

It is not necessary to describe separate lots or tracts of land in giving said notice, but the heading of such notice and the text thereof shall give, and it is sufficient if each gives, such descriptions as will enable the owner of land or the owner of an interest of record therein to determine whether or not his land is covered by such descriptions. For instance, it is sufficient to state in the heading "NOTICE OF HEARING ON APPRAISALS ON LANDS LYING IN _____, _____, and _____ _____ TOWNSHIPS AND IN THE CITIES OR VILLAGES OF _____, and _____ in _____ COUNTY" and it is sufficient to state in the text "All land lying in the _____ ward of the city of _____," or "All land abutting on _____ street in the city of _____ _____," or "All land lying west of _____ river and east of _____ railroad in _____ _____ township," or any other general description pointing out the lands involved.

Where lands in different counties are mentioned in said report, it is not necessary to publish a description of all the lands in the district in each county, but only of that part of said lands located in the county in which publication is made.

The board of directors of such conservancy district shall, on or before the date of first publication of the notice provided for in this section, cause to be mailed by first class mail to the public corporations and to the owners of property whose names and respective tax mailing or other known addresses are disclosed by the affidavit referred to in this section a notice which in each case shall be directed to such respective address and which shall advise the addressee thereof of the date of the filing, and place of filing, of the report of the board of appraisers, and that the addressee has the right to file exceptions to the

report on or before a specified date and to be heard thereon in the county where his property is located at the time and place fixed by the court as provided by section 6101.33 of the Revised Code. In addition the notice shall contain, if the report includes an appraisal of benefits affecting the addressee, a statement that such benefits have been appraised and that assessments may be levied based upon, and not in excess of, such appraisal, and the dollar amount of the appraisal, shall contain, if the report includes an appraisal of property of the addressee to be taken or damaged, a statement that such property or the damage thereto has been appraised and the dollar amount of such appraisal, and shall contain any volume designation and page number of the report at which any appraisal affecting the addressee appears and a brief description of the property appraised as referred to in section 6101.31 of the Revised Code. In the case of property to be taken or damaged the board of directors shall cause like notice to be mailed on the same date to all other known persons having an interest of record in such property whose tax mailing or other known address is disclosed by the affidavit referred to in this section. The secretary of the conservancy district, or his deputy, as ex officio secretary of the board of appraisers, shall prepare and file with the clerk of the court on the date of the mailing of the notices provided for in this section an affidavit attesting in substance that as of the date of the mailing of the notices, the affiant has determined that the names of all public corporations and the names of the owners of all the property affected by the report of the board of appraisers, where such names are ascertainable, together with their respective tax mailing or other known addresses where ascertainable, are listed in the report of the board of appraisers with the exception of such differing names or addresses as may be specifically set forth in the affidavit,

that no names and no tax mailing or other known addresses are ascertainable except as may be disclosed by such report as supplemented by the affidavit, and that notices have been mailed as provided for in this section to each public corporation and to each owner of property having a tax mailing or other known address as shown by such report or affidavit and to all other persons having an interest of record in property to be taken or damaged whose interest is known or can be ascertained from such record. Such affidavit shall be given on the basis of available information and after the exercise of reasonable diligence, and the affidavit shall so state. Such affidavit shall be prima-facie evidence of the matters attested to therein.

§ 6101.35 Appeal from award; bond; requirements.

Any person or public or private corporation desiring to appeal from an award as to compensation or damages shall, within twenty days from the judgment of the court confirming the report of the board of appraisers of a conservancy district, file with the clerk of such court a written notice making demand for a jury trial, specifying the award or awards from which the appeal is taken. He shall at the same time file a bond with good and sufficient security to be approved by the clerk in the sum of not more than two hundred dollars to the effect that if the appellant does not recover more by the verdict of the jury than the sum awarded him by the board, or if the verdict is not more favorable to him, he will pay the costs of the appeal.

The appeal shall be from the award of compensation or damages, or both, shall require the conservancy district to commence proceedings pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code, but shall not include the questions of necessity for the appropriation, inability of the parties to agree, or any other part of the decree of the court.

Upon filing a petition as provided for in section 163.05 of the Revised Code, a copy thereof shall be served upon each appellant or his attorney, and no other service of summons is necessary.

§ 6101.43 Proceedings not invalid except when defects result in denial of justice.

No fault in any notice or other proceedings, whether by reason of noncompliance with the requirements of sections 6101.01 to 6101.84, inclusive, of the Revised Code, or with any applicable constitutional requirements, or otherwise, shall affect the validity of any proceeding under sections 6101.01 to 6101.84, inclusive, of the Revised Code, except to the extent to which it can be shown that such fault resulted in a material denial of justice to the property owner of public corporation complaining of such fault.

If it is found upon a hearing that by reason of some irregularity or defect in the proceedings the appraisal has not been properly made, the court may nevertheless, on having proof that expense has been incurred which is a proper charge against the property of the person, or against the public corporation, complaining of such irregularity or defect, render a finding as to the amount of benefits to said property or public corporation, and appraise the proper benefits accordingly, subject to a claim for a jury as provided in section 6101.35 of the Revised Code, where the party is entitled thereto. Thereupon said land or public corporation shall be assessed as other land or public corporations equally benefited. If at any time either before or after the issuance of bonds or notes pursuant to sections 6101.01 to 6101.84, inclusive, of the Revised

Code, the appraisal of benefits, either as a whole or in part, is declared by any court of competent jurisdiction to be invalid by reason of any defect or irregularity in the proceedings therefor, whether jurisdictional or by reason of noncompliance with any of the requirements of sections 6101.01 to 6101.84, inclusive, of the Revised Code, or with any applicable constitutional requirements, or otherwise, the court of common pleas, on the application of the board of directors of the conservancy district or on the application of any holder of any bonds or notes which have been issued pursuant to such sections, shall promptly and without delay remedy, or cause to be remedied, all defects or irregularities as the case requires and for such purpose may direct the board of appraisers of the conservancy district to make, in the manner provided in section 6101.28 of the Revised Code, a new appraisal of the amount of benefits against the whole or any part of the lands or any public corporation in said district as the case requires and may order a new hearing to be held after giving of notice thereof in compliance with the requirements of sections 6101.01 to 6101.84, inclusive, of the Revised Code, or such other and further notice as the court shall prescribe to comply with any applicable constitutional requirements.

§ 6101.59 Conservancy assessment constitutes a lien.

All conservancy assessments and taxes provided for in sections 6101.01 to 6101.84, inclusive, of the Revised Code, together with all penalties for default in payment of the same, and all costs in collecting the same, including a reasonable attorney's fee to be fixed by the court and taxed as costs in the action brought to enforce payment, from the date of filing the certificate described in this section in the office of the county auditor for the county wherein the lands and properties or public corporations

are located, until paid, shall constitute a lien, to which only the lien of the state for general state, county, municipal corporation, school, and road taxes shall be paramount, upon all the lands and other property or public corporation against which such taxes are levied as is provided in sections 6101.01 to 6101.84, inclusive, of the Revised Code. No lands or properties to which the lien of the conservancy assessments or taxes has attached shall be forfeited to the state pursuant to its lien for taxes except pursuant to section 5723.01 of the Revised Code. Such lien of the conservancy assessments and taxes may be evidenced by a certificate substantially in the form in the schedule provided in section 6101.84 of the Revised Code. The certificate and tables shall be prepared in a well-bound book by the secretary of the conservancy district at the expense of the district.

Unless expressly declared to the contrary, no warranty in any warranty deed or in any deed made pursuant to a judicial sale shall warrant against any portion of any assessment levied under sections 6101.01 to 6101.84, inclusive, of the Revised Code, except past and current installments payable in the year which such deed bears date.

§ 6101.60 Suits for delinquent taxes and assessments; procedure. (GC § 6828-54)

The "Delinquent Assessment Book" of a conservancy district is prima-facie evidence in all courts of all matters therein contained. The liens established and declared in section 6101.59 of the Revised Code may be enforced at the option of the board of directors of the conservancy district by an action on delinquent tax bills or assessment bills, made and certified by the county auditor, which action shall be instituted in the court of common pleas, without regard to the amount of the claim, within

six months after the thirty-first day of December of the year for which said assessments were levied. The suit shall be brought in the corporate name of the district by its attorney against the land, property, or public corporation on which such tax or assessment has not been paid.

In the event of any default in the payment of the interest or principal of any bonds or notes issued pursuant to sections 6101.01 to 6101.84, inclusive, of the Revised Code, and if the district or its proper officers fail to enforce the payment of any unpaid tax or assessment, the holder of such bonds or notes may, for himself and for the benefit of all others similarly situated, enforce said liens by suit or action against the land, property, or public corporation on which such tax or assessment has not been paid, and against the district. The court shall have full power, jurisdiction, and authority to apply such tax or assessment when collected in the payment of the interest or principal upon said bonds or notes as justice and equity require. The suit shall be brought in the county in which the property or public corporation is located, except when the tract or property sued upon is in more than one county, in which event the suit may be brought on the whole tract, parcel, or property, in any county in which any portion thereof is located. The pleadings, process, proceedings, practice, and sales, in cases arising under such sections, except as provided in such sections, shall be the same as in an action for the enforcement of the state's lien for delinquent general taxes upon real estate.

All sales of lands made under this section shall be by the sheriff as provided by law. All sheriff's deeds executed and delivered pursuant to sections 6101.01 to 6101.84, inclusive, of the Revised Code, shall have the same probative force as other deeds executed by a sheriff. Abbreviations shall not defeat the action. The title acquired through any

sale of lands or other property under such proceedings shall be subject to the lien of all subsequent annual installments of conservation or drainage tax or assessment.

In all suits for the collection of delinquent taxes or assessments, the judgment for said delinquent taxes or assessments and penalty shall also include all costs of suit and a reasonable attorney's fee to be fixed by the court, recoverable the same as the delinquent tax and in the same suit.

The proceeds of sales made under and by virtue of such sections shall be paid at once to the county treasurer and shall be properly credited and accounted for by him the same as other conservation taxes and assessments.

If any assessment made pursuant to such sections is invalid, the board shall by subsequent or amended acts or proceedings promptly remedy all defects or irregularities as the case requires by making and providing for the collection of new assessments or otherwise.

APPENDIX F

Excerpts from
The Ohio Legal Directory 1976-1977
(Legal Directories Publishing Company, Inc., 1976)

LAWRENCE COUNTY — Population 55,351
COUNTY SEAT — IRONTON (Area Code 614 - Zip 45638
4th Judicial District

Judges Court of Appeals
- Homer E. Abele ..... (McArthur) 596-4305
- Earl E. Stephenson ..... (Portsmouth) 354-4300
- Lawrence Grey ..... (Athens) 593-5093

Judges Common Pleas
- Kenneth B. Ater ..... (Ironton) 532-4466
- Roy L. Henry ..... (Ironton) 532-4466

Probate Judge
- Lloyd Burwell ..... (Ironton) 532-7982

Judge County Court
- J. Stewart Kaiser ..... (Chesapeake) 867-3254

Clerk Common Pleas
- Dale Burcham ..... (Ironton) 532-7982

Prosecuting Attorney
- Richard Meyers ..... (Ironton) 532-7982

Court Reporter
- Edna Chapman ..... (Ironton) 532-4466

County Auditor
- Ray G. Waller ..... (Ironton) 532-7982

County Treasurer
- Bernard McKnight ..... (Ironton) 532-7982

County Recorder
- Ray T. Dutey ..... (Ironton) 532-7982

Assignment Commissioner
- Jo Gallion ..... (Ironton) 532-4466

County Coroner
- H. H. Nenni, M.D. ..... (Ironton) 532-5353

Sheriff
- James Howell ..... (Ironton) 532-3525

County Engineer
- Ralph Hill ..... (Ironton) 532-7982

County Commissioners
- W. H. Kaiser ..... (Ironton) 532-7982
- Louis Bryant ..... (Ironton) 532-7982
- Mark Malone ..... (Ironton) 532-7982

Ibid. at 431.

SCIOTO COUNTY — Population 77,082
COUNTY SEAT — PORTSMOUTH (Area Code 614 - Zip 45662
4th Judicial District

Judges Court of Appeals
- Homer E. Abele ..... (McArthur) 596-4305
- Lawrence Grey ..... (Athens) 593-5093
- Earl E. Stephenson ..... (Portsmouth) 534-4300

Probate Judge
- William T. Miller ..... (Portsmouth) 353-1189

Clerk of Courts
- Mildred E. Thompson ..... (Portsmouth) 353-4829

Probate Clerk
- Eva Rhoden ..... (Portsmouth) 353-1189

Prosecuting Attorney
- Lynn A. Grimshaw ..... (Portsmouth) 354-3226

Court Reporter
- Jeanne Tyler ..... (Portsmouth) 353-6068

County Auditor
- Roy E. Vastine ..... (Portsmouth) 354-3219

County Treasurer
- Ronald Greene ..... (Portsmouth) 353-3859

Judges Common Pleas
- Ralph W. Mullins ..... (Portsmouth) 353-6068
- John B. Marshall ..... (Portsmouth) 353-6068

County Recorder
- Harold Hanes ..... (Portsmouth) 353-6519

Assignment Commissioner
- Catherine Smith ..... (Portsmouth) 353-6246

County Coroner
- Dr. John Cunningham ..... (Portsmouth) 353-4219

Sheriff
- John P. Knauff ..... (Portsmouth) 354-7566

County Engineer
- Timothy Thoroughman ..... (Portsmouth) 354-4898

County Commissioners
- Wilbur Rase ..... (Portsmouth) 354-5664
- Howard Griffin ..... (Portsmouth) 354-5664
- Paul Griffith ..... (Portsmouth) 354-5664

Ibid. at 500-501.